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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No.: 2023AP851

Circuit Court Case No.: 20CV3189

ESTATE OF CLARENCE MURELL JUNIOR
ANGEL SODAMADE
CLARENCE MURRELL JUNIOR, III,

Plaintiffs-Respondents,

v.

MOROCCO INVESTMENTS, LLC
WILL J. SHERARD
WJ SHERARD REALTY,

Defendants-Appellants.

On Notice of Appeal From an Order for Judgment and Judgment Entered in the Circuit Court of Milwaukee County, The Honorable William O. Sosnay Presiding

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Brief of the Defendants-Appellants

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellants contend neither oral argument nor publication are warranted in this case as this appeal involves the application of a specific set of facts to established law.

STATEMENT OF THE ISSUES

Did the circuit court's Order for Judgment constitute an erroneous exercise of discretion because the circuit court did not consider the principle of comparative negligence? The circuit court did not answer this question.

Did the circuit court's order for punitive damages constitute an erroneous exercise of discretion because the circuit court failed to apply the correct law when imposing punitive damages? The circuit court did not answer this question.

STATEMENT OF FACTS

Tragically, Clarence Murrell, Jr. and Patricia Colston died in an apartment fire in Milwaukee in 2019. Colston was a tenant of Morocco Investments, LLC pursuant to a tenancy which began in October 2019. (R. 88:3). Murrell, Jr. was Colston's friend. (R. 88:3). The property caught fire with both Colston and Murrell inside. (R. 88:3). Both Colston and Murrell died from smoke and soot inhalation. (R. 88:3).

The Estate of Clarence Murrell, Jr., and Murrell's children, Angel Sodamade and Clarence Murrell Junior III sued the owner of the apartment, Morocco Investments, LLC, along with the single member of Morocco, William J. Sherard and an additional entity, sole proprietorship WJ Sherard Realty[1] under several causes of action specifically for Negligence, Wrongful Death, Survivorship Claim, Pierce the Corporate Veil, Fraudulent Transfer and Punitive Damages. (R. 88).

[1] For purposes of this brief Morocco Investments, LLC, Will J. Sherard and WJ Sherard Realty will be collectively referred to as "Defendants".

Due to violations of discovery orders, the circuit court entered default judgment on all six claims for relief in plaintiffs' second amended complaint, including the claim for punitive damages. (R. 92 & 194).

Instead of conducting an evidentiary hearing, the court allowed the parties to present their arguments regarding damages through written submissions. After review of the written submissions, the court entered a written Order for Judgment. (R. 150).

Defendants presented a written submission along with several exhibits. (R. 128-139). Defendants asserted that while the cause of the fire appeared to be electrical in nature, the cause remained undetermined. (R. 128:2). Defendants' submitted documentation showing that the fire was very small and was extinguished in about 20 seconds. (R. 128:2). Defendants presented evidence that Murrell, Jr. had cocaine in his system at the time of the fire. (R. 131).

Defendants argued that the deceased should have had ample opportunity to exit the back door in the kitchen and escape the fire and that the front entrance and back entrance were not blocked by fire. (R. 128:3). Defendants pointed out that there are two entrances at the property. (R. 128:4). Murrell, Jr. was also fully dressed at the time of the fire. (R. 128:3). Defendants further argued that Colston neglected to advise them of any hazardous outlet or failed smoke detectors. (R. 128:3).

Defendants contended that the code violations were irrelevant as they dealt with other properties and at the time of the fire there were not any violations at this particular property. (R. 128:4).

Notwithstanding the above arguments, the circuit court entered a substantial judgment in plaintiffs' favor. In its order for judgment, the circuit court concluded that Sherard had "shown a reckless disregard for the laws, statutes and ordinances obligating him to provide safe and habitable conditions to these tenants", referenced code violations and asserted that his intentional disregard of his tenants' safety culminated in the deaths of Murrell, Jr. and Colston. (R. 150:1-2). The court ruled that one of the defendants' properties was kept in a defective and unsafe condition. (R. 150:2). The court concluded that Sherard's disregard of safety put his tenants at risk and referenced code violations purportedly issued to Sherard in the year after the fire. (R. 150:2). The court ordered punitive damages in order to prevent further tragedies and because without punitive damages Sherard would have a financial incentive to remain in violation of the housing code. (R. 150:2).

The court specifically allocated the damage award, which totaled $1,350,000, as follows:

$350,000 for wrongful death

$650,000 for pain and suffering

$350,000 for punitive damages

Defendants filed a Notice of Appeal (R. 171) and now appeal the Order for Judgment.

ARGUMENT

I. THE CIRCUIT COURT'S ORDER FOR JUDGMENT CONSTITUTED AN ERRONEOUS EXERCISE OF DISCRETION.

A. THE CIRCUIT COURT NEVER CONSIDERED DEFENDANTS ARGUMENT THAT THE DECEDENTS HAD TIME TO VACATE UNIT AFTER THE FIRE STARTED.

In Wisconsin, a person acts negligently when "'he or she does something or fails to do something under circumstances in which a reasonable person would foresee that by his or her action or failure to act, he or she will subject a person or property to an unreasonable risk of injury or damage.'" ***Jankee v. Clark County***, 2000 WI 64, 56 Wis. 2d 700, 612 N.W.2d 297.

"The doctrine of contributory negligence acknowledges that the same duty of care obligates persons to exercise ordinary care for their own safety." ***Id.***, 235 Wis. 2d 700. "[T]he burden of proof to establish contributory negligence is upon the defendant." ***Helbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 121, 362 N.W.2d 118 (1985). It is not enough to act or fail to act in a way that in fact caused or may have caused harm; the action or failure to act must constitute negligence in order to invoke a contributory negligence defense. ***See Brown v. Dibbell***, 227 Wis. 2d 28, 41, 595 N.W.2d 358 (1999) (defining contributory negligence as "conduct by an injured party that falls below the standard to which a reasonably prudent person in that injured party's position should conform for his or her own protection and that is a legally contributing cause of the injured party's harm.").

Under Wisconsin's wrongful death statute, a person who causes the death of another by a wrongful act is liable for damages whenever the injured party could have maintained an action and recovered damages had death not ensued. WIS. STAT.

§ 895.03. A cause of action for wrongful death is purely statutory; at common law, no such right existed. ***Weiss v. Regent Props., Ltd***., 118 Wis. 2d 225, 230, 346 N.W.2d 766 (1984).

Contributory negligence does not bar recovery if the contributory negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. WIS. STAT. §895.045(1).

Nothing in the record establishes that the circuit court considered defendants' submission when it entered its order for judgment. Nothing in the record establishes that the circuit court considered the fact that Colston had signed a lease 12 days prior to the fire and stated the unit had working smoke detectors. Nothing in the record establishes that the court examined whether Colston was contributorily negligent for not advising Defendants of any concerns with the electrical outlet or smoke detectors. This was an erroneous exercise of discretion.

Similarly, nothing in the record confirms that the circuit court considered the factor of Colston and Murrell, Jr. being able to vacate the property through one of the two exists and to escape the fire. The fire itself was very small and took only 20 seconds to be extinguished. The circuit court should have at least considered whether Colston and Murrell, Jr. had the opportunity to vacate the property and whether they were themselves negligent by, in fact, not vacating the property.

This case is extremely tragic and sad. Defendants recognize this. That being said, defendants raised an assertion of contributory negligence and the circuit court ignored that defense. That is an erroneous exercise of discretion.

The circuit court's judgments for wrongful death and for pain and suffering, therefore, were clearly erroneous and must be reversed on appeal.

The matter must be remanded to the circuit court for an evidentiary hearing to determine the percentage of Murrell, Jr.'s and Colston's negligence and for the circuit court to modify the amount of the judgment accordingly.

B. THE COURT FAILED TO APPLY THE CORRECT LAW WHEN IT IMPOSED PUNITIVE DAMAGES.

The court's entry of punitive damages constituted an erroneous exercise of discretion. "[The Court of Appeals will] apply a highly deferential standard of review to damage awards, affirming if there is any credible evidence which under any reasonable view supports the finding." ***See The Selmer Co. v. Rinn***, 2010 WI App 106, ¶28, 328 Wis. 2d 263, 789 N.W.2d 621. In Wisconsin, the award of punitive damages is within the discretion of the factfinder. ***See Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 626, 563 N.W.2d 154 (1997). The Court of Appeals is "reluctant to set aside an award merely because it is large or [it] would have awarded less." ***Id***.

The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff. WIS. STAT. §895.043(3). Punitive damages

received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater. WIS. STAT. §895.043(6).

Sub. (3) requires evidence of either malicious conduct or intentional disregard of the rights of the plaintiff, not both. ***Henrikson v. Strapon***, 2008 WI App 145, 314 Wis. 2d 225, 758 N.W.2d 205. An intentional disregard of rights "necessitates that the defendant act with a purpose to disregard the plaintiff's rights or be aware that his or her conduct is substantially certain to result in the plaintiff's rights being disregarded." ***Strenke v. Hogner***, 2005 WI 25, ¶36, 279 Wis. 2d 52, 694 N.W.2d 296. An "intentional disregard of rights" must be a deliberate "course of conduct." ***Id***. at ¶38.

A punitive damages award "is excessive, and therefore violates due process, if it is more than necessary to serve the purposes of punitive damages or inflicts a penalty or burden on the defendant that is disproportionate to the wrongdoing." ***Trinity Evangelical Church v. Tower Ins. Co.***, 2003 WI 46, ¶50, 261 Wis. 2d 333, 661 N.W.2d 789. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." ***BMW of North America v. Gore***, 517 U.S. 559, 574 (1996); ***see also Trinity***, 2003 WI 46 at ¶51.

Courts apply a six-factor test to determine whether a punitive damages award is excessive: 1) the grievousness of the acts; 2) the degree of malicious intent; 3)

whether the award bears a reasonable relationship to the award of compensatory damages; 4) the potential damage that might have been caused by the acts; 5) the ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct; and 6) the wealth of the wrongdoer. Courts are called upon to analyze only those factors that are most relevant to the case. The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. ***Kimble v. Land Concepts, Inc.***, 2014 WI 21, 353 Wis. 2d 377, 845 N.W.2d 395.

This Court has long recognized that the Due Process Clause of the Wisconsin and federal constitutions impose "substantive limits on the size of punitive damage awards." ***Trinity Evangelical Lutheran Church & Sch. - Freistadt v. Tower Ins. Co***., 2003 WI 46, ¶¶ 5, 49, 261 Wis. 2d 333, 661 N.W.2d 789; ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co***., 206 Wis. 2d 158, 193, 557 N.W.2d 67 (1996).

The purpose of punitive damages is to punish and deter, not to compensate the plaintiff. ***Management Computer Serv***., 206 Wis. 2d at 193; ***Wangen v. Ford Motor Co.***, 97 Wis. 2d 260, 303, 294 N.W.2d 437 (1980); ***Fahrenberg v. Tengel***, 96 Wis. 2d 211, 234 291 N.W. 2d 516 (1980); ***Malco v. Midwest Aluminum Sales***, 14 Wis. 2d 57, 66, 109 N.W.2d 516 (1961).

"[T]he constitutional issue of punitive damages merits de novo review." ***Trinity Evangelical Lutheran Church & Sch.- Freistadt v. Tower Ins. Co***., 2003

WI 46, ¶47, 261 Wis. 2d 333, 661 N.W.2d 789 (citing ***Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.***, 532 U.S. 424, 431 (2001)).

In determining if the defendant's conduct was reprehensible, the Court considers whether the harm it inflicted was physical or economic; whether the conduct evinced a reckless indifference to the health or safety of others; whether the harm resulted from intentional malice, trickery, deceit as opposed to mere accident; whether the target was financially vulnerable; and whether the conduct was single and isolated or involved repeated actions. ***Strenke***, 2005 WI 25, ¶ 16 (citing ***State Farm Mut. Automobile Ins. Co. v. Campbell***, 538 U.S. 408, 419 (2003)).

If a court determines that the plaintiff has proven that the defendant's conduct was sufficiently egregious to warrant the imposition of a punitive damage award, the court considers the second element, whether or not the amount of the award is reasonably related to the conduct. This Court has said that "[e]xemplary or punitive damages should reflect 'the enormity of [the] offense.'" ***Trinity***, 2003 WI 46, ¶ 101 (quoting ***BMW***, 517 U.S. at 575.) (internal quotation marks omitted).

Here, the court erred by ordering punitive damages in its order for default judgment on the punitive damages issue and then erred in its issuance of a punitive damages award.

The court should not have ordered punitive damages by default. The availability of punitive damages depends on the character of the particular conduct committed rather than on the theory of liability propounded by the plaintiff. ***See Wangen v. Ford Motor Co***., 97 Wis.2d 260, 269, 294 N.W.2d 437 (1980) (citing

Entzminger v. Ford Motor Co., 47 Wis.2d 751, 757-58, 177 N.W.2d 899 (1970)). The statute is also consistent with prior case law in permitting punitive damages for "malicious" acts. Wisconsin jury instructions define "malicious" acts as those resulting from hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. ***Id***.

There is no case law which defines "intentional disregard of the plaintiff's rights." However, the Wisconsin Supreme Court has stated that the ill-intent necessary to recover punitive damages requires that "something must be shown over and above the mere breach of duty for which compensatory damages can be given. That is, a showing of bad intent deserving punishment, or something in the nature of special ill will towards the person injured . . ." ***Wangen***, 97 Wis. 2d at 268, 294 N.W.2d 437 (quoting ***Meshane v. Second St. Co***., 197 Wis. 382, 387, 222 N.W. 320 (1928)). Based on the law, the circuit court needed to find more, beyond what was alleged in the second amended complaint, before it could conclude that punitive damages were appropriate. Additionally, there was no evidence that defendants acted maliciously or intentionally disregarded plaintiffs' rights. A boilerplate assertion in a complaint that defendants acted in intentional disregard of plaintiffs' rights is not sufficient. ***See Unified Catholic Schools of Beaver Dam Education Association vs. Universal Card Services Corp***., 34 F.Supp.2d 714, 720 (E.D. Wis. 1999).

Defendants conduct, while negligent, was not sufficiently egregious to warrant imposition of punitive damages. The circuit court focused almost

exclusively on "other acts" of defendants in connection with defendants' other rental properties. Those other acts were largely irrelevant. This case involved a small fire that may or may not have been caused by an electrical issue. The fire was an accident. There were no outstanding property code violations at the property at the time of the fire. Code violations at other properties had nothing to do with this accidental fire and should not have formed a basis for the imposition of punitive damages.

Even if punitive damages were appropriate, the court's order for punitive damages does not reflect an appropriate exercise of judicial discretion. The circuit court's order for judgment does not indicate that the circuit court considered the six factors when determining punitive damages: 1) the grievousness of the acts; 2) the degree of malicious intent; 3) whether the award bears a reasonable relationship to the award of compensatory damages; 4) the potential damage that might have been caused by the acts; 5) the ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct; and 6) the wealth of the wrongdoer. The court's decision does not show a rational exercise of discretion. Instead, the court punishes defendants for other acts and for violations that allegedly occurred at the property after the fire. The harm resulted from mere accident. As stated previously, the deaths of Colston and Murrell, Jr. are tragic. That does not, however, mean that the circuit court does not have to follow and apply the correct law regarding punitive damages. The court should have considered the grievousness of the acts and degree

of malicious intent related to the accidental fire. The circuit court did not. This was an erroneous exercise of discretion.

The bottom line is that the circuit court should have conducted a trial on damages. This would have allowed the parties, and the court, to flesh out the issues related to punitive damages and contributory negligence.

For these reasons, the order for judgment should be reversed and the case should be remanded to the circuit court for a proper determination of (1) whether punitive damages are warranted; and (2) if so, the proper amount of punitive damages.

CONCLUSION

For all of the above reasons the circuit court's order for judgment constituted an erroneous exercise of discretion and must be reversed.

Dated this 20th day of June, 2024.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§809.19(8)(b)&(c) for a brief produced with a proportional serif font. The length of this brief is 2,774 words.

I hereby further certify that this brief was submitted electronically pursuant to the rules contained in Wis. Stat. §809.801(8).

Dated this 20th day of June, 2024.

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